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Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES
October Term 1998

MICHAEL D. IVESTER,
Petitioner,

v.

STATE OF MISSOURI,
Respondent.

Petition For A Writ of Certiorari
To The United States Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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* Gregory R. Futhey
780 Lakeside Plaza
Lake St. Louis, MO 63367
(314) 978-9099

Attorney for Petitioner
* *Counsel of Record*

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QUESTIONS PRESENTED

QUESTION #1

Whether an approximate 27 month pretrial, post accusatory period of incarceration prior to trial triggers a presumption of actual prejudice under the fourth inquiry of the Barker standard for the Constitutional application of the Speedy Trial Clause of the Sixth Amendment to the United States Constitution and the Speedy Trial Clause of Article One Section 18(a) of the Missouri Constitution.

QUESTION #2

Can the presumption of actual prejudice be rebutted by using Petitioner's post conviction and post trial sentencing statements and can such statements be used to fulfill the State's burden to rebut the presumption of prejudice.

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IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL IVESTER, Petitioner

v.

STATE OF MISSOURI, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

Michael D. Ivester respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Missouri and the Missouri Court of Appeals, Eastern District in this case.

CITATIONS OF OPINIONS BELOW

The opinions of the Missouri Court of Appeals, Eastern District (App., infra, p. Apdx-4) are reported at 978 S.W.2d. 762 (Mo.App.E.D. 1998). The order retransfering the cause from the Missouri Supreme Court to the Missouri Court of Appeals (App., infra, p. Apdx-2) is unreported.

JURISDICTION

The Missouri Court of Appeals, Eastern District, entered it's Opinion on April 21, 1998, (App., infra, p. Apdx. 4) and the Missouri Court of Appeals, Eastern District, thereafter ordered the cause transferred to the Missouri Supreme Court on June 11, 1998. (App., infra, p. Apdx. 3) The Missouri Supreme Court entered its order retransfering the cause to the Missouri Court of Appeals on October 20, 1998 (App., infra, p. Apdx-2). The Missouri Court of Appeals, Eastern District, denied Petitioner's Motion for Rehearing on November 16, 1998, (App., infra, p. Apdx-1). The Honorable William K. Suter, Clerk of the United States Supreme Court then rejected Petitioner's original Petition For A Writ of Certiorari on January 19, 1999, and by letter dated January 29, 1999, from the Honorable William K. Suter, Petitioner was granted

sixty (60) days from January 29, 1999, to file the corrected copies of the Petition For A Writ of Certiorari. (App., infra, p. Apdx. 55) The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defence."

These Sixth Amendment rights are guaranteed to the citizens of the State of Missouri through Section 1 of the Fourteenth Amendment to the United States Constitution which provides that : .

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 1 of Article 18(a) of the Missouri Constitution provides:

"That in criminal prosecutions, the accused shall have the right to appear and defend, in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county."

Subsections (1) and (2) of Section 545.780 RSMo. provide:

"1. If defendant announces that he is ready for trial and files a request for a speedy trial, then the court shall set the case for trial as soon as reasonably possible thereafter.

2. The provisions of this section shall be enforceable by mandamus. Neither the failure

to comply with this section nor the state's failure to prosecute shall be grounds for the dismissal of the indictment or information unless the court also finds that the defendant has been denied his constitutional right to a speedy trial."

STATEMENT OF CASE

On December 4, 1993, Petitioner was arrested and confined in the St. Charles County, Missouri jail after being charged with one count of forcible rape, one count of forcible sodomy and one count of felonious restraint and was not given a trial until March 12, 1996. Petitioner was arraigned on March 7, 1994. The trial was originally set for May 12, 1995, seventeen months after Defendant was jailed on December 4, 1993. On May 4, 1995, the State filed a request to endorse additional witnesses. Following this request, the case was continued. The State and Petitioner discussed a guilty plea on one charge. On May 12, 1995, with the consent of the State, Defendant requested a continuance

for a plea of guilty on May 19, 1995. The parties did not reach an agreement for a plea because the attorneys held opposing views on which charge would be the subject of the plea. On May 19, 1995, the cause was continued to be reassigned. On June 9, 1995, an amended information was filed by the State. On August 16, 1995, Petitioner filed a Motion to Dismiss and Preclude Trial of all Matters for Failure to Provide Defendant Speedy Trial or, In the Alternative, Request for Speedy Trial. (App., infra, p. Apdx. 39) On August 24, 1995, the trial court, without explanation, denied the Motion to Dismiss and to Preclude Trial of all Matters for Failure to Provide Defendant Speedy Trial and the trial did not commence until March 12, 1996. On August 24, 1995, both the State and the Defendant, in writing, requested a priority trial setting. The trial court record does explain or justify the delay from August 24,

1995, to the trial on March 12, 1996. Prior to the commencement of the trial on March 12, 1996, Petitioner orally renewed his Motion to Dismiss for failure to provide Petitioner with a speedy trial citing the four factors espoused in Barker (App., infra, Apdx. 42). In Petitioner's argument, he cited his actual prejudice as being unable to assist his counsel, unable to see his children, unable to recall names of witnesses and that witnesses had moved or changed their telephone numbers. (App. infra, p. Apdx. 45-46). Again, without explanation, the trial court denied Petitioner's motion. (App., infra, p. Apdx. 49) During trial, Petitioner was unable to and did not testify or present any evidence. The jury returned guilty verdicts on all three counts.

Petitioner timely filed his Request for and Additional Ten Days to File Motion for New Trial or, in the alternative, Defendant's Motion for New Trial

(App., infra, p. Apdx. 50) asserting in paragraph 3 the trial court's error in failing to dismiss for its failure to provide Petitioner a speedy trial in violation of his right to a speedy trial as guaranteed by the United States and the Missouri Constitutions. On November 18, 1996, the trial court took up the cause for sentencing and denied said Motion for New Trial. Prior to the trial court proceeding to conduct the sentencing hearing, Petitioner, again, renewed Petitioner's objection to the jurisdiction of the trial court to proceed for its failure to provide Petitioner with a speedy trial and the trial court denied the renewed objection. (App., infra, p. Apdx. 54). The court then received a statement from Petitioner and the victim and, thereafter, sentenced Petitioner to the Missouri Department of Corrections.

Thereafter Petitioner timely filed his Notice of Appeal and, after oral arguments, the Missouri Court of

Appeals, Eastern District, entered its order and opinion affirming Petitioner's convictions on April 21, 1998. (App., infra, p. Apdx. 1). The Missouri Court of Appeals, Eastern District, affirmed Defendant's convictions with a majority of two and a dissent of one. The majority of the Court of Appeals, with which the dissent agreed, stated that Petitioner's period of incarceration and the state's inability to bring Petitioner to trial was almost three and one-half times as what Missouri Courts consider sufficient to trigger the complete Barker inquiry. However, the majority assumed without deciding that in this case there was a presumption of prejudice and looked to the Petitioner's sentencing statements to see if the presumption was rebutted. After reviewing the sentencing statements, majority concluded that the presumption of prejudice was persuasively rebutted. (App., infra, pp Apdx. 20 -

Apdx. 27).

Thereafter, Petitioner timely filed his Motion for Rehearing. The Missouri Court of Appeals, Eastern District, then ordered the cause transferred to the Missouri Supreme Court for consideration (App., infra, p. Apdx. 3). On October 7, 1998, counsel for Petitioner argued this cause before the Supreme Court of the State of Missouri and thereafter the Supreme Court of the State of Missouri entered its order retransfering said cause to the Missouri Court of Appeals, Eastern District (App., infra, p. Apdx. 2). The Missouri Court of Appeals, Eastern District, then entered its order denying Petitioner's Motion for Rehearing (App., infra, p. Apdx. 1).

REASONS FOR GRANTING THE PETITION

The trial court's denial of Petitioner's Motion to

Dismiss for Failure to Provide Speedy Trial as interpreted by the Missouri Court of Appeals, Eastern District, is in direct conflict with the decision of this Court in Doggett v. United States 505 U.S. 647, 112 S.Ct. 2696, 120 L.Ed.2d. 520 (1992) and Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d. 101 (1972) and the cases related thereto.

QUESTION #1

Whether an approximate 27 month pretrial, post accusatory period of incarceration prior to trial triggers a presumption of actual prejudice under the fourth inquiry of the Barker standard for the Constitutional application of the Speedy Trial Clause of the Sixth Amendment to the United States Constitution and the Speedy Trial Clause of Article One Section 18(a) of the Missouri Constitution.

As this Honorable Court is aware, the four

inquiries of Barker v. Wingo standard are (1) whether delay before trial was uncommonly long; (2) whether the government or the criminal defendant is more to blame for that delay; (3) whether, in due course, the defendant asserted his right to a speedy trial; and (4) whether the defendant suffered prejudice as the delay's result. Doggett v. United States, supra at 651.

Petitioner was incarcerated from December 4, 1993, to March 12, 1996, until such time as he was granted a trial in this matter. The majority of the Court of Appeals stated in State v. Ivester, with which the dissent agreed, that this twenty seven month pre-trial incarceration was almost three and one-half times as long as what Missouri courts consider sufficient to trigger the complete Barker inquiry for analyzing the presumptive prejudice in speedy trial issues (App., infra, p. Apdx. 20). The majority of the Court of Appeals,

Eastern District, assumed, without deciding, that there was a presumption of actual prejudice under the fourth prong and looked further into the record to see if the presumption was rebutted. (App., infra, Apdx. p. 20 - Apdx. 21).

To the extent the Missouri Court of Appeals, Eastern District, failed to find specifically that there was a presumption of actual prejudice in this matter, they are in direct conflict with the principles espoused in Barker as construed by Doggett and in internal conflict with its own holding in that twenty seven months of pretrial incarceration does create a presumption of actual prejudice under the fourth prong of the Barker analysis.

QUESTION #2

Can the presumption of actual prejudice be rebutted by using Petitioner's post conviction and post trial sentencing statements and can such statements be

used to fulfill the State's burden to rebut the presumption of prejudice.

The majority and the dissent of the Missouri Court of Appeals, Eastern District, in State v. Ivester agreed that the first three inquiries were to be weighed in favor of Petitioner, Michael Ivester, and against the State, however, the majority and the dissent disagreed as to the fourth prong, i.e. the presumption of actual prejudice, and whether that presumption of prejudice had been rebutted.

This case of the State v. Ivester is difficult to factually distinguish from Doggett. In Doggett, the defendant had been indicted and was not arrested for approximately eight and one half years after his indictment. Upon the trial court's denial of his Motion to Dismiss for Violation of his Sixth Amendment Constitutional Rights, defendant unequivocally plead

guilty to the charges. Doggett was not incarcerated during all or substantially all of the period between his indictment and his plea of guilty. This Honorable Court held that Doggett's unequivocal plea of guilty could not be used by the government to rebut the presumption of prejudice which resulted due to the length of time between his indictment and the plea in the matter.

The State, in this case at bar, did not in any fashion rebut the presumption of actual prejudice to Petitioner. The only attempt to rebut the presumption of prejudice in this matter was accomplished by the Missouri Court of Appeals, Eastern District, using Petitioner's sentencing statements received after the objection of Petitioner to the jurisdiction of the sentencing court. The Majority found that Petitioner, allegedly by his own statements, fulfilled the State's obligation to rebut the presumption of prejudice.

In Doggett, this Court refused to allow Doggett's unequivocal plea of guilty to be used to rebut the Government's burden to rebut the presumption of prejudice. Petitioner's case in this regard is much stronger than Doggett's to the extent that Petitioner was incarcerated the entire twenty seven months and has all of the factors available to him under the number four principle relating to the presumption of actual prejudice.

Under the fourth prong of Barker, the Sixth Amendment rights are there to protect and prevent oppressive pretrial incarceration, to minimize anxiety and concern of the accused and to limit the possibility that the defense will be impaired. Petitioner, Michael Ivester, has each and every one of the presumed prejudice which a defendant may have, while Doggett, as set forth in the dissent in Doggett, could not claim the first two catagories of the prejudice to defendant, i.e. to

prevent oppressive pretrial incarceration and to minimize the anxiety and concern of an accused, because he had not been incarcerated pretrial for such an extended period of time and because he was unaware of the indictment in his matter. Doggett could not be heard to claim that he was anxious or concerned.

Accordingly, the majority of Missouri Court of Appeals, Eastern District, is in error in affirming this conviction for the reason that defendant is entitled to the presumption of actual prejudice and the presumption was not rebutted by the State. Further, the application of the law pursuant to the Missouri Court of Appeals, Eastern District decision in State v. Ivester is in direct conflict with this Court's opinion in Doggett v. United States for the reasons that the use of Petitioner's post conviction sentencing hearing is in direct conflict with the holding in Doggett v. United States.

CONCLUSION

The Constitution of the United States protects everyone from unreasonable state action. Missouri failed to provide Mr. Ivester with a speedy trial and failed to rebut the presumption of actual prejudice to Mr. Ivester. His convictions were entered as a result of an unconstitutional trial which should have been determined at the onset of the trial and, applying the Barker standard, the State failed to rebut the presumption of prejudice. For all the reasons advanced herein, Petitioner, Michael Ivester, respectfully requests that this Honorable Court grant his Petition for a Writ of Certiorari.

Respectfully Submitted,

GREGORY R. FUTHEY
MBE#28896
Attorney for Petitioner
780 Lakeside Plaza
Lake St. Louis, MO 63367
(314) 978-9099

No._____

IN THE SUPREME COURT OF THE UNITED STATES

_____

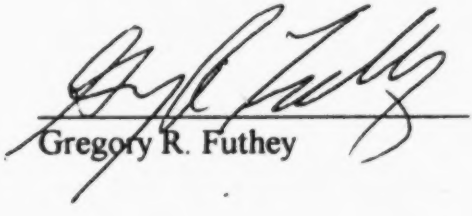
MICHAEL IVESTER, Petitioner
v.
STATE OF MISSOURI, Respondent

_____

AFFIDAVIT OF SERVICE

The undersigned Affiant states that three true and accurate copies of the Petitioner's Petition for a Writ of Certiorari with the appendix were mailed via first class, postage prepaid this 29th day of March, 1999, to:

Breck Burgess
Assistant Attorney General
P.O. Box 899
Jefferson City, Missouri 65102



Gregory R. Futhey

STATE OF MISSOURI)
) SS.
COUNTY OF ST. CHARLES)

Subscribed and sworn to before me this 29th day of March, 1999.

Stephen J. Stephenson
Notary Public

My Commission Expires:

STEPHEN J. STEPHENSON
St. Charles County
My Commission Expires
November 8, 2001

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI

Michael D. Ivester, Petitioner

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In The Missouri Court of Appeals
Eastern District

State of Missouri,	)	No. 71745
	)	
Respondent,	)	
	)	
vs.	)	
	)	
Michael Ivester,	)	
	)	
Appellant.	)	

ORDER

This cause has been retransferred from the Supreme Court. Order of June 11, 1998 is set aside. Appellant's motion for rehearing is denied. The Clerk is directed to issue the mandate forthwith.

SO ORDERED.
DATED: November 16, 1998

\s\ Mary Rhodes Russell
Mary Rhodes Russell
Acting Chief Judge
Missouri Court of Appeals
Eastern District

cc: Gregory Futhey
Breck Burgess
West Publishing Company

SUPREME COURT of MISSOURI

en banc

October 20, 1998

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	Supreme Ct No. 80885
	)	
MICHAEL D. IVESTER,	)	
	)	
Appellant.	)	

ORDER

Cause ordered retransferred to the Court of Appeals, Eastern District.

Day - to - Day

\s\ Duane Benton
DUANE BENTON,
Chief Justice

In the Missouri Court of Appeals
Eastern District

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. 71745
	)	
MICHAEL D. IVESTER,	)	
	)	
Appellant.	)	

ORDER

On the Court's own motion, cause is transferred to the Supreme Court after opinion in accordance with Supreme Court Rule 83.02. Appellant's motion for rehearing is denied as moot.

Date: June 11, 1998

\s\ Lawrence G. Crahan
Chief Judge

cc: Gregory Futhey
Daniel Follett

In the Missouri Court of Appeals
Eastern District

DIVISION THREE

STATE OF MISSOURI,	) No. 71745
	)
Respondent,	) Appeal from the Circuit
	) Court of St. Charles
	) Co.
vs.	)
	) Hon. William T.
	) Lohmar
MICHAEL D. IVESTER,	)
	) Opinion filed:
Appellant.	) April 21, 1998

Defendant, Michael Ivester, appeals from judgments of conviction, after a jury trial, for forcible rape, forcible sodomy, and felonious restraint. He was sentenced to consecutive prison terms of two life sentences and seven years respectively. We affirm.

On appeal, defendant does not challenge the sufficiency of the evidence to support his convictions. On December 3, 1993, defendant arrived home around

6:00 p.m. His wife was there when he arrived. Defendant had been drinking. He became violent and began to destroy the furniture and the interior of the home. He beat his wife repeatedly and threatened to kill her. He struck their two-year old child while his wife was holding him. He laughingly told his nine-year old stepson who was present that he was going to kill his mother. The stepson bravely attempted to protect his mother but failed. Defendant continued to beat his wife, then took her to the bedroom and forcibly sodomized her and forcibly raped her twice. His announced justification was that she was his wife and therefore he could do whatever he wanted to do.

Wife was finally able to leave her home in the early morning of December 4, 1993. She drove to the police station and arrived there at approximately 5:30 a.m. Within thirty minutes of her arrival at the station,

officers went to the residence and placed defendant under arrest. Defendant has been in custody since that day.

The state charged defendant in an amended information with forcible rape, forcible sodomy, and felonious restraint. He was arraigned on March 7, 1994. Trial was originally set for May 12, 1995, seventeen months after defendant was jailed. On May 4, 1995, the state filed a request to endorse additional witnesses. Following this request, the case was continued. The parties discussed a guilty plea on one charge. On May 12, 1995, with the consent of the state, defendant requested a "continuance for a plea of guilty on May 19, 1995." The parties did not reach an agreement for a plea because the attorneys held opposing views on which charge would be the subject of the plea. On May 19, 1995, the "cause was

continued to be re-assigned." On June 9, 1995, an amended information was filed.

Two months later, on August 16, 1995, defendant filed a motion to dismiss for failure to provide a speedy trial or, in the alternative, a request for a speedy trial. The trial court denied the request to dismiss and the trial did not commence until March 12, 1996. On August 24, 1995, both the state and defendant requested a priority trial setting. The trial court record does not explain or justify the delay from August 1995, to the trial on March 12, 1996. During trial, defendant did not testify or present any evidence. He continued to assert his speedy trial rights were violated. The jury returned guilty verdicts on all three counts. Defendant's motion for new trial was denied and the court sentenced defendant. Defendant raises two points on appeal.

Defendant first argues the trial court erred in denying his motion to dismiss because a twenty-seven month delay from his arrest to trial deprived him of his right to a speedy trial guaranteed by the United States Constitution and Missouri Constitution. The state responds that defendant was brought to trial in an orderly and expeditious manner and that defendant was not prejudiced by the delay.

The Sixth Amendment to the United States Constitution and Art. I, section 18(a) of the Missouri Constitution guarantee a criminal defendant the right to a speedy trial. State v. Fleer, 851S.W.2d 582, 595 (Mo.App. E.D. 1993). To determine whether a defendant has been denied his constitutional right to a speedy trial, Missouri has adopted the balancing process set forth in *Barker v. Wingo*, 407 U.S. 514(1972). State v. Bolin, 643 S.W.2d 806, 813-

16(Mo. banc 1983). The process requires the balancing of four factors: (1) length of delay; (2) reason for the delay; (3) defendant's assertion of his right to a speedy trial; and (4) prejudice to defendant. State v. Davis, 903 S.W.2d 930, 936 (Mo.App. W.D. 1995).

The first factor is actually a double inquiry. Doggett v. United States, 505 U.S. 647, 651(1992). Initially, we examine the length of the delay to determine if the delay is ordinary or presumptively prejudicial. A further inquiry into the remaining factors is required only if the delay reaches a level presumed to be prejudicial. If the length of the delay is not presumptively prejudicial, the request for dismissal may be denied without explaining or weighing the remaining factors. State v. Farris, 877 S.W.2d 657, 659-60(Mo.App. S.D. 1994). The presumption that pretrial delay prejudices defendant increases over time, and we

must again examine the length of the delay when analyzing prejudice to the defense, a consideration in the fourth factor of the *Barker* analysis. Doggett, 505 U.S. at 652.

Defendant was arrested on December 4, 1993, but was not tried until March 12, 1996. The length of the delay totaled more than twenty-seven months. A delay of eight months or longer is presumptively prejudicial and therefore, an examination of the remaining three factors is necessary. Farris, 877 S.W.2d at 660.

A delay of three and one-half the times the period creating a presumption of prejudice is alarming especially when we consider the time frames and standards for case processing set forth by our Supreme Court in Administrative Rule 17.23. Even though the rule went into effect after this trial, it establishes a

standard for what is considered tolerable pretrial delay on a felony charge. The time frames and standards for circuit court felonies are fifty percent processed in four months, ninety percent disposed of in eight months, and ninety-eight percent completed in twelve months. A twenty-seven month delay for a defendant incarcerated in a county jail is wholly incompatible with the supreme court standards, particularly where the delay is unexplainable. The length of the delay is strong support for defendant.

Furthermore, defendant was in custody in the St. Charles County jail for all twenty-seven months before he was tried. There were no other charges pending, no missing witnesses for the state, and defendant was not undergoing mental examinations. There simply was no excuse for this case not to go to trial. The victim, wife, not only underwent the trauma

of the events of December 3 and 4, 1993, but also suffered the stress of waiting twenty-seven months for the uncertainty to end.

The second factor to consider is the reason for the delay. Different weights are assigned to the different explanations given for the delay. Delays deliberately intended to harm the defense are weighed heavily against the state. State v. Raine, 829 S.W.2d 506, 512(Mo.App. 1992). Delays attributable to the state's negligence or overcrowded court dockets are weighed against the state, although weighed less heavily. Id. Delays for valid reasons are justified and not weighed against the state. Id. Delays attributable to defendant weigh heavily against defendant. State v. Darnell, 858 S.W.2d 739, 745 (Mo.App. W.D. 1993). However, "it is ultimately the duty of the state to bring a defendant to trial." Bolin,

643 S.W.2d at 814(citing Barker, 407 U.S. at 527).

There is no claim the court or the prosecutor deliberately delayed the trial to hamper the defense. However, the state has no reasonable explanation to justify the long delay between defendant's arrest on December 4, 1993, and defendant's trial on March 12, 1996. Both parties were equally responsible for the few weeks of delay attributed to a plea negotiation. It was granted with consent of the state. Except for that period of time, the state has no explanation for the failure of the trial court to set and try the case. It suggests, without any citation, an overcrowded court docket may have been the reason. It requested five trial settings. The court granted one, for May 19, 1995, before the trial setting of March 12, 1996. There is nothing in the record to support a finding St. Charles County was so burdened with cases between December

1993, and March 1996, that it could not try three serious, related felonies where the trial lasted three days. While a neutral explanation such as overcrowded dockets is weighed less heavily against the state, it is still ultimately the state's duty to bring the defendant to trial. Fleer, 851 S.W.2d at 596. Here, there is no explanation. This factor weighs against the state.

The third factor evaluates the timing of the defendant's assertion of his right to a speedy trial. Although defendant has no affirmative duty to bring himself to trial, failure to assert his right to a speedy trial makes it difficult for defendant to prove he was denied a speedy trial. Davis, 903 S.W.2d at 936. Defendant must make a formal request to assert his right to a speedy trial. Id.

Defendant formally asserted his right to a speedy trial on August 16, 1995, approximately twenty

months after his arrest and detainment. As is *Davis*, the overall pretrial delay before and after defendant's motion for speedy trial is primarily attributable to the state. In *State v. Davis*, 903 S.W.2d 930(Mo.App. W.D. 1995), and *State v. Woodworth*, 941 S.W.2d 679(Mo.App. W.D. 1997), it took eight and seven months respectively for the defendants to receive a trial after they asserted their right to a speedy trial. These cases found that this factor should not be weighed for or against the state or defendant because of the delay by defendant in asserting his right. In *Davis*, the state provided specific reasons to justify or explain the delays. Davis, 903 S.W.2d at 936. Additionally, after the defendant formally asserted his right to a speedy trial, he caused four months of the additional delay. Id. *Woodworth*, relies on *Davis* for the proposition that this factor is not weighed for or against the state because

defendant waited so long to assert his right. Woodworth, 941 S.W.2d at 694. The present case is distinguishable. In *Woodworth*, the multiple charges which required complicated evidence tend to explain a seventeen month period from charge to trial. Here, we are reviewing a three day trial. The evidence to support findings defendant committed the charged crimes was essentially the testimony of one prosecuting witness. This case is also distinguished by the complete absence of any explanation why the trial court would not provide a trial on the request of defendant for a speedy trial and a priority trial, particularly where the state also requested a priority setting. See Raine, 829 S.W.2d at 513. On these facts, the failure to honor or explain a dishonor of the request weighs against the state.

Lastly, we must weigh what is considered the

most important of the four factors, prejudice to defendant. This factor is examined in light of three considerations: (1) prevention of oppressive pretrial imprisonment; (2) minimization of defendant's anxiety and concern; and (3) limitation of the possible impairment of the defense. Fleer, 851 S.W.2d at 597. The most important of these considerations is the last. Bolin, 643 S.W.2d at 816.

As to the last consideration, defendant argues that due to the long delay, he was unable to testify and this defeated his ability to provide a defense. In discussing this consideration, defendant fails to specify why he was unable to testify. Resulting prejudice cannot be speculative or possible prejudice. See State v. Edwards, 750 S.W.2d 438, 442(Mo. banc 1988). Defendant did contend in discussing the second prejudice consideration that the anxiety and concern

resulting from his pretrial incarceration culminated in him being unable to testify. He fails to assert and it is unclear why anxiety and concern prevented him from testifying. "Undoubtedly, anxiety and concern exists in every criminal case." Fleer, 851 S.W.2d at 597. However, that alone does not establish prejudice where the defendant neither asserts nor shows that the delay weighed particularly heavily on him or her in specific instances. Id. In addition, defendant's contention is contrary to the statements he made that are quoted below.

Relying on *Doggett,* defendant also argues that his less specific or speculative claims of prejudice should be weighed in his favor and against the state. In *Doggett*, the defendant was indicted on February 22, 1980 and shortly thereafter left the country. Id. at 648-49. The defendant returned to the United States in

September 1982 but was not arrested until September 1988. Id. at 649-50. The defendant moved to dismiss the indictment arguing that his Sixth Amendment right to a speedy trial had been violated. Id. at 650. The defendant's motion was denied and the Court of Appeals affirmed. Id. at 650-51.

On appeal, the Government's principal contention was that the defendant could not prevail on a speedy trial claim because he did not show precisely how he was prejudiced by the delay between his indictment and trial. Id. at 654. The Court stated that *Barker* recognized that impairment of a person's defense "is the most difficult form of speedy trial prejudice to prove..." Id. at 655. The Court also stated that negligence in bringing an accused to trial is not "automatically tolerable simply because the accused cannot exactly demonstrate exactly how it prejudiced

him." Id. at 656-657. In reversing the judgment, the Court held that when the Government's negligence caused a delay six times as long as that generally sufficient to trigger judicial review which depending on the charges is generally one year, and when the presumption of prejudice, albeit unspecified, is neither extenuated, as by the defendant's acquiescence, nor persuasively rebutted, the defendant is entitled to relief. Id. at 658.

Under *Doggett*, detailed proof of prejudice may not be necessary. Here, the state's inability to bring defendant to trial was almost three and one-half times as long as what our courts consider sufficient to trigger the complete *Barker* inquiry. The delay here, however, it not as egregious as that in *Doggett*. Regardless, assuming without deciding that in this case there is a presumption of prejudice, we look to the record to see

if that presumption is rebutted.

Defendant did not testify at trial. At sentencing, however, he requested permission to make a statement to the court prior to the imposition of sentence. The trial court granted defendant's request and after being sworn he stated:

MR. IVESTER: I just want to say that above everything and all, I have no excuses whatsoever for my actions on the night that - that - that the events occurred. And I'm not rebelling and I'm not trying to hide.

I want the Court to know that there is no excuse for adult abuse at all, or any kind of abuse. And I've spent the last three years completely and fully broken. I've just -- I've looked inside and I've investigated fully my past life and then my marriage life and where I'm at today, and I have absolutely no

excuses whatsoever.

And also, there is no reason for me or anyone else to try to force their will on anyone for any reason. I'm thankful for the three years that I have been granted in -- to be able to look inside and to look at things and to see the things the way they are. And I acknowledge that I have been completely a failure in maintaining a lifestyle of wholeness.

....

And I -- I have cried and cried and cried and cried because of the things I've done. And I've sincerely and honestly sought information and knowledge. I've completely sanctified myself in the jail.

....

And I want to thank [defendant's attorney] for really going out for me in the way that he has with the

Court. There's so much I could say, Your Honor. There's so much I want to say, but I don't have the time to sit here and try to -- try to put in all within this few hours, or whatever time. All I know to say is, this past three years I've -- I've come to complete brokenness, and I'm totally remorseful for the events that ha[ve] taken place.

THE COURT: Is there anything that you want to say to her?

MR. IVESTER: [Defendant's wife], I'm sorry. I'm totally sorry. I have no excuses for what I've done in my life. And I have no excuses for what I've done to you or to your family. There are no excuses. I'm an individual that had problems. I had no right to try to force my will upon you or to anyone else. And I want you to know that I'm not a threat to you, not at all. I am never going to ever be a threat to anyone ever again

in my life no matter what. And I want you to know that I am totally sorry for the events that I've done -- for the things that I've done.

[Father in-law], I'm sorry. I'm sorry for the things that I've done. I'm totally -- The past three years has totally broken me into pieces. I have sought the information and I know what I need to do for the rest of my life. I know what I've done. I'm not hiding it and I'm not rebelling. I know what my potentials are for good and I know what my mistakes were.

....

MR. IVESTER: I'm totally -- totally, completely -- completely broken about the whole thing. And I'm not denying to you [the trial judge] or [wife] or to no one that I am without guilt of anything. I'm an individual, Your Honor. I know there's a lot of domestic violence out there and I know that there has

to be things done about it. I've listened for three years. I have paid and I know that I've got to pay. I know that I'm paying right now this moment today.

After defendant completed his statement, the victim made a statement to the court. See Section 557.041.2 RSMo 1994. The court then granted allocation and imposed sentence. After sentence was imposed, the trial court questioned defendant regarding his legal representation:

THE COURT: Are you fully and completely satisfied with the services that [attorney] has rendered you in this case?

MR. IVESTER: Yes.

THE COURT: Has he investigated your case fully?

MR. IVESTER: Yes.

THE COURT: Has he interviewed all possible

witnesses?

MR. IVESTER: Yes.

THE COURT: Do you have any complaint of any kind whatsoever that you would make against [your attorney]? If you do, now would be the time to make it, not later.

MR. IVESTER: No, I'm not complaining about [my attorney].

Defendant, by his statements, admitted his wrong doing, offered no excuse, and apologized to his wife. In addition, he was thankful for his lengthy pretrial incarceration because it permitted him to begin to rehabilitate himself mentally and spiritually.

As to prejudice to his defense, defendant stated that he had no excuses, his case was investigated fully by his attorney, his attorney interviewed all possible witnesses, and he was completely satisfied with his

attorney's representation. We find that even if there was a presumption of prejudice in this case, that presumption is persuasively rebutted by defendant's own statements. Defendant first point is denied.

No jurisprudential purpose would be served by addressing in a written opinion defendant's second point, and this point is denied. Rule 30.25(b).

The judgments of conviction are affirmed.

\s\ William J. Crandall, Jr.
William H. Crandall, Jr.,
Judge

Clifford H. Ahrens, P.J.: Concurs
Kent E. Karohl, J.: Dissents in a separate opinion filed.

In the Missouri Court of Appeals
Eastern District

DIVISION THREE

STATE OF MISSOURI,	) No. 71745
	)
Respondent,	) Appeal from the Circuit
	) Court of St. Charles
	) Co.
vs.	)
	) Hon. William T.
	) Lohmar
MICHAEL D. IVESTER,	)
	) Opinion filed:
Appellant.	) April 21, 1998

DISSENT

I respectfully dissent. The trial court denied defendant's motions to dismiss the charges because the state denied him a speedy trial. The United States and the Missouri Constitutions guarantee a speedy trial. The state kept defendant in the St. Charles County Jail for twenty-seven months before a three-day trial. There are no facts which support a finding that there

was any cause or excuse for denying defendant a speedy trial. The only issue for this court is whether the trial court erred when it overruled defendant's motions before the trial.

The review of this constitutional issue was defined in *Barker v. Wingo*, 407 U.S. 514 (1972); *Doggett v. United States*, 505 U.S. 747 (1992); and, *State v. Bolin*, 643 S.W.2d 806 (Mo. banc 1983). That review is directed at the ruling when made. So long as a defendant retains his constitutional rights, nothing which occurs during an unconstitutional trial in violation of those rights is relevant to the review. Otherwise, no court would be required to rule, and no court would rule, on this issue until after sentencing. There is no legal authority to support a contrary conclusion. In this case the state had a full opportunity to justify the delay and offer the court facts to support

findings that negate adverse findings on the relevant factors. If all of those factors were unfavorable to the state before the trial, then the trial court erred, and the trial was unconstitutional. An event which occurred after the trial cannot make constitutional what was unconstitutional before it began. The majority opinion will send a message that speedy trial motions will not be decided until after a trial, or worse, after sentencing. It is likely that this will become a persistent issue on appeal. If twenty-seven months of unexplained pre-trial incarceration before the trial is not a denial of constitutional rights solely because of defendant's statements at a sentencing hearing, then the length of pre-trial incarceration is incidental to the decision on these motions. Every word of the opinion could be the same for a defendant held seven years if that was the only factual difference.

It is agreed that the three factors of length of delay, reason for delay, and defendant's assertion of his right to a speedy trial strongly support defendant's motion to dismiss. On the fourth factor, actual prejudice, there is agreement on the presumption of prejudice which compounds over time as the presumption of evidentiary prejudice grows. "When the government's negligence thus causes delay six times as long as that generally sufficient to trigger judicial review, ... and when the presumption of prejudice, albeit unspecified, is neither extenuated, as by the defendant's acquiescence, ... nor persuasively rebutted, the defendant is entitled to relief." Doggett, 505 U.S. 647 at 648. (Emphasis added). On the issue of actual prejudice there would be no disagreement if the review was directed at the trial court's ruling, when made. The state offered no facts to support a finding of no

actual prejudice at the time of the ruling. It made no effort to rebut the presumption of prejudice. There is no disagreement that for two of the three approved considerations on the issue of actual prejudice, prevention of oppressive pre-trial imprisonment and minimization of defendant's anxiety and concern, defendant was actually prejudiced. We disagree only on whether the third consideration, which we define as prejudice to the defense, was rebutted.

In *Doggett*, the defendant was charged for a number of years, but not arrested or incarcerated. In our case, defendant was incarcerated for the delay period and always maintained his innocence. Doggett entered a guilty plea, subject only to error in overruling motions to dismiss. The United States Supreme Court reversed after rejecting the government's principal contention that the defendant could not show "precisely

how he was prejudiced by the delay between his indictment and trial." Id. at 654. The court said, "consideration of prejudice is not limited to the specifically demonstrable, ... affirmative proof of particularized prejudice is not essential to every speedy trial claim ... [T]hus, we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove, or for that matter, identify." Id. at 655-656. *Doggett* will not support the proposed observation in the majority opinion that "detailed proof of prejudice may not be necessary." The court said and held it is not necessary. It did so in a case where defendant pled guilty. Finally, the court held "the Government's egregious persistence in failing to prosecute Doggett is clearly sufficient." Id. at 657. The disagreement in this case narrows to a finding of no actual prejudice from

the delay.

If we assume, without legal precedent or authority, the statements defendant made after the trial are relevant, they were not a waiver of a lost right or a retraction of a claim of actual prejudice. This assumption is in conflict with the result in *Doggett*. *Doggett* teaches us that protecting the right of every citizen to a speedy trial is an obligation of the courts which is entirely separate from defendant's guilt or innocence. The Supreme Court rejected the notion that a guilty plea to the charge removed any possibility of actual prejudice. Defendant's statements at sentencing will not support a finding he was guilty of the charged crimes. At most, his statements support finding he: (1) acknowledged his fault for a troubled relationship; and, (2) did not claim his trial attorney was ineffective. He was referring to the trial attorney who asserted and

preserved his constitutional rights to a speedy trial. His statements do not oppose or conflict with his claims of prejudice because of lost memory or an inability to call a missing witness. These specifications were before the court when he presented his motions to dismiss. Even if a detailed specification is not required in every speedy trial claim, as said in *Doggett*, 506 U.S. at 665, defendant provided specifications. He told the court he could no longer remember the names of potential witnesses. There was a witness who could not be located because he or she had moved or changed phone numbers during defendant's pre-trial incarceration. These specifications were unchallenged. It should be noted the prosecutor joined defendant in requesting a priority trial setting. The unexplained delay was not the fault of a prosecutor who tried to protect defendant's constitutional rights. This may explain why the

presumption of prejudice cannot be rebutted by the state.

Defendant's statements at the sentencing did not conflict with these specified grounds. He had "no excuses." He was "fully broken." There was no reason for "me or anyone else to force their will on anyone for any reason." He acknowledged "that I have been completely a failure in maintaining a life style of wholeness." He cried and cried for the things that he had done; he thanked his attorney "for really going out for me." He had no excuses for what he had done to his wife or her family. He did not deny he was without guilt of anything. He has paid and knows he has "got to pay." Individually or collectively, these statements do not constitute a plea of guilty to the charged crimes. Hence, they are less relevant than Doggett's plea of guilty. They do not address and they wholly fail to

provide grounds to rebut his unchallenged specifications of actual prejudice. On the contrary, they support a finding that defendant was "totally, completely - - completely broken about the whole thing." In context, he was speaking generally and summarizing his condition after the extended, unjustified pre-trial incarceration which was punitive, unjust and unconstitutional.

"The right to a speedy trial is generically different from any of the other rights enshrined in the Constitution for the protection of the accused.... [T]here is a societal interest in providing a speedy trial which exists separate from, and at time in opposition to, the interests of the accused." Barker v. Wingo, 407 U.S. at 519. An affirmance in the present case will diminish every citizen's constitutional rights; it approves denying a speedy trial to a defendant who

pled not guilty and maintained his innocence of the charged crimes. It cannot be harmonized with *Doggett*, the latest controlling decision of the United States Supreme Court, on a federal constitutional issue because: (1) the delay was uncommonly long; (2) defendant was free of any blame for the delay; (3) he asserted his constitutional right to a speedy trial; and, (4) the state failed to offer any acceptable explanation or excuse.

Defendant and his defense were actually prejudiced as a result of the delay. The strong, unrebutted presumption of prejudice is supported by unopposed specifications of actual prejudice. Thus, all four factors in *Barker* and *Bolin* are weighed heavily against the state. We are obligated to reverse and remand with direction to dismiss.

\s\ Kent E. Karohl
Kent E. Karohl, Judge

STATE OF MISSOURI)
) SS.
COUNTY OF ST. CHARLES)

IN THE CIRCUIT COURT
OF ST. CHARLES COUNTY
STATE OF MISSOURI
DIVISION 4

STATE OF MISSOURI,	)
	)
Plaintiff,	)
	)
vs.	) Cause No:
	) CR193-2787F
	)
IVESTER, MICHAEL,	) Div #1
	)
Defendant.	)

MOTION TO DISMISS AND TO PRECLUDE TRIAL OF ALL MATTERS FOR FAILURE TO PROVIDE DEFENDANT SPEEDY TRIAL OR, IN THE ALTERNATIVE, A REQUEST FOR SPEEDY TRIAL

COMES NOW, Defendant, by and through his undersigned attorney and hereby moves this court to dismiss with prejudice all charges filed in the above styled and numbered cause for the failure of the State

to provide Defendant with a speedy trial pursuant to Section 545.780 RSMo. and the Sixth Amendment of the United States Constitution and states as follows, to wit:

a. That Defendant was duly arraigned in this matter on or about February 7, 1994, and that thereafter this matter was set for trial and Defendant was ready for trial.

b. That Defendant has been incarcerated on this charge in excess of one year, that this matter was set for this trial and Defendant was not afforded said trial.

c. That the State has wholly failed to provide Defendant with a speedy trial in violation of his due process and sixth amendment rights to a speedy trial.

WHEREFORE, your movant prays the order of this Court to dismiss with prejudice all charges filed in this matter and to release your movant from the St. Charles County Jail or, in the alternative, to deem this Defendant's Request for a Speedy Trial in this matter and for such other and further orders as to this court may seem just and proper in the premises.

\s\ Gregory R. Futhey
GREGORY R. FUTHEY, #28896
Attorney at Law
780 Lakeside Plaza
Lake St. Louis, MO 63367
314-978-9099

CERTIFICATE OF SERVICE

This certifies that a copy of the foregoing was hand delivered this 16th day of August, 1995 to the Prosecuting Attorney's Office, ATTN: Mr. Phillip Groenweghe, St. Charles County Courthouse, 300 North Second Street, Suite 601, St. Charles, Missouri 63301-5415.

\s\ Gregory R. Futhey

EXCERPT FROM TRANSCRIPT ON APPEAL
VOLUME I, PAGES 19 - 27

MR. FUTHEY: One final motion, then, your Honor.

I move that this case be dismissed for failure to provide defendant with a speedy trial and based upon the rulings in Barker versus United States or the Barker case, there is four factors that need to be considered by the Court and those factors are has the delay been unreasonable.

If it is unreasonable, how did it become delayed.

The third one is, did the defendant request a speedy trial and the fourth one was, was the defendant prejudiced by the State's failure to provide him with a speedy trial.

Number one, the defendant has been incarcerated some twenty-seven months. There is some dispute as to why it has taken twenty-seven months to get it to trial, but on or about August 16th, 1995, there was filed with this Court a request to dismiss, or in the alternative, request for a speedy trial.

That was heard on August 24th. This Court denied the request to dismiss and it is my understanding

was treated as a request for a speedy trial.

Some two hundred days have passed since that request and that order. The defendant is just now being brought to trial.

The reason for the delay for the last two hundred days has been the responsibility of the State, be it the court system or the prosecuting attorney. He was unable to obtain a trial within roughly seven months from the time he requested. He filed his request to dismiss or in the alternative speedy trial.

The case law would say that whether it is negligence or, I don't know, I am not here to state that was the intention of the prosecution on this, but possibly due to the negligence of the State and the court system, he was unable to be brought to trial in almost seven months. So I would say that that balancing factor has to be weighed against the state.

As far as the third issue goes, the defendant did request a speedy trial in August of 1995. I disagree with what if the State is saying as far in a prior motion it indicated that the reason that it was continued off the docket for trial was that there was a misunderstanding between counsel, Mr. Joseph McCarthy, and counsel

for the State, Mr. Phil Groenweghe.

Mr. Ivester, as I understand it, was informed that the recommendation was based upon him basically picking a count and he chose the felonious restraint to plead to.

Mr. Groenweghe indicated that it was not felonious restraint, it had to be the rape in open court. Judge Conard was the judge on the day we argued.

MR. GROENWEGHE: I'm going to object to all of this. None of this is in the record. If he wants to call Judge Conard as a witness, that's fine, but, you know, he is sitting here saying what transpired and there is no record of it.

He has got a record. If he has got witnesses, that's fine, but I'm going to object to him making statements about what happened.

MR. FUTHEY: Mr. Groenweghe was in open court. He can deny whether Judge Conard made these statements or not.

THE COURT: I have Judge Conard's memo here.

MR. FUTHEY: The trial that was scheduled ahead of Mr. Ivester on the date that it was

set for trial went to trial. Judge Conard stated in open court that he would not have reached that case had Mr. Ivester pled or not pled.

So as far as it goes, I would say that Mr. Ivester requested a speedy trial in August, had trial setting whenever it was, would have been bumped off the docket, but also there was a potential of a plea, a negotiated plea arrangement, but there was miscommunication between counsel for the State and counsel for the defendant.

Finally, Judge, the fourth balancing factor, I have case law on this if the Court would like to read it, but the fourth balancing factor which all of the Court of Appeals say is the heaviest weighing factor is how has the defendant been prejudiced by this?

The defendant has been prejudiced by this in that you can't, he has been in jail for twenty-seven months. He has been unable to work, he has been unable to assist his counsel in representing him in this. He has not been able to see his children, his child and his other son from a previous marriage which all are causing his stress and anxieties which the Court recognizes as a prejudice.

Also, he is prejudiced to the extent that after three years, he doesn't recall names of witnesses, you know, he can't assist counsel in providing his defense because he can't recall names of witnesses.

What witnesses there were available that moved or changed their numbers, it is all accumulated to his prejudice, and I would request that the Court dismiss this with prejudice for failure to provide speedy trial. Thank You.

MR. GROENWEGHE: If I can respond, Judge?

THE COURT: You may.

MR. GROENWEGHE: There isn't any prejudice here because, first of all, if they were prejudiced, why in May of 1995 did he request a continuance. And that is what the record shows is that the defense requested a continuance of this case and then after, now Mr. Futhey says there was a misunderstanding.

As far as I'm concerned, there was no misunderstanding. He chickened out of the plea and then caused us to lose our trial date we had. The he files a speedy trial knowing it is very difficult in this

jurisdiction to get another trial setting. And I think when you ask for a continuance and blow a trial setting, you can't then turn around and ask for a speedy trial in a jurisdiction like this. I think you waive it when you ask for a continuance and blow a trial setting date which you had.

I would point out they talk about two-and-a-half years, he never filed any speedy trial request until August and so most of the delay and most of the problems he claims were caused by this delay are really attributable to that period before he ever filed a speedy trial request.

I do dispute this personal stress in not seeing his children would constitute prejudice. In a legal sense it doesn't.

In any event, after the continuance was granted at the defense's request, the Court filed, I'll ask the Court to take judicial notice of it -- will show that the State of Missouri asked for five trial settings of this case. We have been diligent.

The first trial setting requested was May 19th is the very day this has been set for a guilty plea. He didn't plead guilty. That same day if filed a request for

trial setting.

We filed a second request for trial setting July 25th.

Then the defendant filed his request for speedy trial. The case still hadn't been set so on August 24th, just a few days after, about a week after he had filed his request for speedy trial, we filed yet another request for trial setting and on that we advise the Court. Defendant requested a priority setting as the defendant requested speedy trial.

Then we filed another request for trial setting on September 26th and noted priority setting as requested for speedy trial.

And then I show another request had been filed. I don't know if I mentioned this January 27th of '95 which would have been, I guess, the first one filed so that's a total of six that had been filed in this.

Unlike a detainer case which requires when an inmate is incarcerated and the inmate's disposition of detainers where one hundred and eighty days is required, that is not the case here. So we are not counting days.

It is just the case law in Missouri as far as

speedy trial, and I think that we have been diligent in asking for a speedy trial. The defendant has frustrated the State's ability to grant him a speedy trial by continuing a previous trial setting. And the fact that he did that, I think negates all of his argument about it.

If it is prejudicial to delay the case, how come he continued it? Why did he continue the case? Why didn't he go ahead and plead guilty on the trial setting?

I think his whole argument is negated by that.

The State has put the Court on notice that there is a detainer and I assume, the Court being aware of that, has set this as expeditiously as it could and by setting it today, it is tantamount to a ruling that this is a speedy trial.

THE COURT: The Motion to Dismiss is denied.

STATE OF MISSOURI)
) SS.
COUNTY OF ST. CHARLES)

IN THE CIRCUIT COURT OF
ST. CHARLES COUNTY
CIRCUIT JUDGE DIVISION

STATE OF MISSOURI,	)
	)
Plaintiff,	)
	)
vs.	) Circuit Court
	) No. CR193-2787FX
MICHAEL D. IVESTER,	)
	) Division No. 1
Defendant.	)

REQUEST FOR AN ADDITIONAL TEN DAYS TO FILE MOTION FOR NEW TRIAL OR, IN THE ALTERNATIVE, DEFENDANT'S MOTION FOR NEW TRIAL

Comes Now Defendant, by and through his undersigned attorney, and hereby requests an additional ten (10) days to file Defendant's Motion for New Trial for the reason that Defendant is incarcerated and that counsel continues to investigate and prepare Defendant's Motion for New Trial or, in the alternative,

Defendant hereby files with this Court his Motion for New Trial upon the following grounds, to wit:

1. That this Court erred in its failure to grant Defendant's continuance orally requested at the time of trial for the reason that the State was allowed to endorse witnesses on the day of trial.

2. That this Court erred in granting the State's Request to Endorse witnesses on the day of trial and allowing the State to introduce pictures not previously made available to Defendant, all done over the objection of the Defendant.

3. That this Court erred in failing to grant Defendant's Request for the Dismissal for failure to provide Defendant with a speedy trial all in violation of Defendant's right to a speedy trial as guaranteed by the United States Constitution and the Missouri State Constitution.

4. That this Court erred in allowing the State to introduce evidence of prior alleged acts of domestic violence on the part Defendant against the alleged victim in this matter.

5. That this Court erred in allowing the State to introduce over the objection of Defendant the pictures of prior alleged domestic violence alleged to have been done by Defendant against the alleged victim.

6. That this Court erred in its failure to grant Defendant's Motion for Judgment of Acquittal at the close of the State's case.

7. That the Court erred in not declaring a mistrial when a juror was inadvertently allowed to remain in the courtroom after Defendant's failed attempt to plead guilty to the charges.

WHEREFORE, Defendant prays the order of

this Court granting him an additional ten (10) days to file his Motion for New Trial, or in the alternative, Defendant requests a New Trial for the reasons set out herein above and for such other and further orders as the Court may seem just and proper in the premises.

\s\ Gregory R. Futhey
GREGORY R. FUTHEY, MBE#28896
Attorney for Defendant
780 Lakeside Plaza
Lake St. Louis, MO 63367
(314) 978-9099

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed this 28th day of March, 1996, to Office of the Prosecuting Attorney, Attention: Mr. Phil Groenweghe, St. Charles County Circuit Courthouse, Sixth Floor, 300 N Second, St. Charles, Missouri 63301.

\s\ Gregory R. Futhey

EXCERPT FROM TRANSCRIPT ON APPEAL
VOLUME II, PAGES 5 -6
SENTENCING

MR. FUTHEY: Judge, may I have one matter before the record -- for the record before we go? I want to renew my objection that this Court does not have jurisdiction because it failed to grant the defendant a speedy trial. Other than that, that's my only objection at this time. I just want to reserve that objection for the record.

MR. GROENWEGHE: That was something that was ruled on.

THE COURT: Yes, I've already ruled on that.

MR. FUTHEY: Yes, you ruled on that, but I feel that -- I think I need to reserve any potential ruling on that. I think I need to reserve by objecting that this Court does not have jurisdiction because it denied the defendant a speedy trial, which you have already ruled on.

THE COURT: Very well. Your renewed objection is denied.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543-0001

January 29, 1999

WILLIAM K. SUTER

Area Code 202
479-3011

Gregory R. Futhey
780 Lakeside Plaza
Lake St. Lukes, MO 63367

RE: Michael Ivester v. Missouri

Dear Mr. Futhey:

Your petition for a writ of certiorari in the above-entitled case was received January 19, 1999, and must be returned.

If you intend to pay the $300.00 filing fee, the petition must be on paper that is 6 1/8 by 9 1/4 inches stated in Rule 33.1 of the enclosed Rules of the Court. Items in the appendix may not be photoreduced. They must be reformatted so that the type size complies with rule 33.1. If petition is indigent, you may preface the petition with a motion for leave to proceed in forma pauperis with an affidavit in support as stated in Rule 39.

I do not find that you are a member of the Bar of this Court which you must be in order to file this petition. See Rule 34.1. Enclosed is an application for

admission to the Bar of this Court.

Corrected copies of the petition must be received back in this office within 60 days of the date of this letter. See Rule 14.5. Rule 29.2 does not apply.

This office shall retain your check in the amount of $300.00 in expectation of receipt of a properly prepared petition.

Sincerely,

William K. Suter, Clerk
By: \s\
Francis J. Lorson
(202) 479-3024

Enclosures

cc: Breck Burgess

Supreme Court, U.S.
FILED
JUN 16 1999
CLERK

No. 98-1584

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1998

MICHAEL D. IVESTER,
Petitioner,

vs.

STATE OF MISSOURI,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

STACY L. ANDERSON
Assistant Attorney General
Counsel of Record

DANIEL W. FOLLETT
Assistant Attorney General
Of Counsel

Post Office Box 899
Jefferson City, MO 65102
(314) 751-3321

Attorneys for Respondent

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STATEMENT OF THE CASE

Petitioner, Michael D. Ivester, was convicted of forcible rape, § 566.030, RSMo 1994, forcible sodomy, § 566.060, RSMo 1994, and felonious restraint, § 565.120, RSMo 1994, for which he was sentenced to two terms of life imprisonment and one term of seven years, all to be served consecutively. The facts at trial established that on December 3, 1996, at approximately 6:00 p.m., petitioner returned home to his wife, Darla Ivester, visibly intoxicated. Petitioner went on a rampage which lasted six hours and included throwing pots and pans, chasing Darla Ivester with a broom and attempting to stab her with a fork. All of this took place in the presence of petitioner's nine year old son, Steven. Petitioner told Steven he was going to kill his mother. Darla and Steven took refuge in the childrens' room while petitioner proceeded to destroy the family's belongings. At one point Steven put his arms around his mother to prevent petitioner from striking her. Later that night, petitioner was able to separate Darla from the children. At that point he threatened to kill her and proceeded to rape her and have oral sex with her against her will. Darla made several attempts to escape, but petitioner restrained her. Darla eventually escaped the next morning by telling petitioner she was going to get milk for the kids. Instead, Darla went to the police station.

Petitioner was arrested on December 4, 1993. On August 16, 1995, petitioner filed a request for a speedy trial. On March 12, 1996, petitioner was brought to trial. At the conclusion of the evidence Appellant was found guilty on all three counts.

Appellant filed notice of direct appeal on December 10, 1997. Appellant alleged, among other matters, that his constitutional rights were infringed by the twenty-seven month delay between his arrest and the beginning of trial.

The Missouri Court of Appeals, Eastern District, issued an opinion affirming Appellant's convictions. State v. Ivester, 978 S.W.2d 762 (Mo.App. E.D. 1998). The case was later transferred to the Missouri Supreme Court by the Missouri Court of Appeals (Petition, Appendix at 3). Arguments were held before the Missouri Supreme Court, but after argument the case was transferred back to the Court of Appeals (Petition, Appendix at 2) and the Missouri Court of Appeals reinstated its opinion (Petition, Appendix at 1).

ARGUMENT

I.

In his petition for a writ of certiorari, petitioner first claims that this Court should grant a writ of certiorari to determine whether a twenty-seven month delay between arrest and trial triggers a presumption of "actual prejudice" (Petition at 11). Petitioner alleges that the opinion of the Missouri Court of Appeals, Eastern District, conflicts with this court's precedent in Doggett v. United States, 505 U.S. 645, 112 S.Ct. 2686 (1992). This question is without merit because the Missouri Court of Appeals correctly applied Doggett to the facts of this case.

The Missouri Court of Appeals, Eastern District, analyzed petitioner's claim under the balancing test established by the United States Supreme Court in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182 (1972). That process requires a weighing of four factors: (1) length of delay; (2) reason for the delay; (3) defendant's assertion of his right to a speedy trial; and (4) prejudice to the defendant.

In so balancing, the Missouri Court of Appeals weighed the first three factors in favor of petitioner. Ivester at 764-766. The fourth factor, however, was weighed in favor of the state since there was no indication that petitioner was prejudiced by the delay between his arrest and his trial. Id. at 766-768. The Missouri Court of Appeals analyzed this factor in light of this court's precedent in Doggett v. United States, 505 U.S. 657, 112 S.Ct. 2686 (1992). Ivester at 766. The Missouri court conceded that under Doggett detailed proof of prejudice was not required. Id. The Missouri court also assumed, for the sake of petitioner's appeal, that an excessive delay could result in a presumption of actual

prejudice.[1] Id. The Missouri Court went on to find that this presumed prejudice was rebutted by petitioner's statements at sentencing in which he 1) said he had no excuses for his actions, 2) said that there was no reason for him to force his will on anyone, 3) indicated that he was thankful for the nearly three years he had spent incarcerated because it had enabled him to rehabilitate himself. Id. at 768. Based on petitioner's statements, there is no indication that his defense was in any way prejudiced by the delay.

Doggett specifically allows for the presumption of prejudice to be rebutted. Doggett 112 S.Ct. at 2694. The Missouri Court of Appeals followed Doggett when it found that, to the extent there was a presumption of prejudice, it was rebutted by the absence of any evidence that petitioner's defense was prejudiced.

Petitioner's first question is without merit, because the Missouri Court of Appeals presumed prejudice existed due to the delay but found that it was rebutted. This case presents no question that is worthy of the review of this Court.

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[1] Doggett does indicate that an excessive delay may result in a presumption of some actual prejudice. In order for relief to be granted solely on the basis of this presumed prejudice, however, it must last longer than if the defendant has some evidence of particularized trial prejudice. Id. at 2694. In this case, although the Missouri Court of Appeals gave petitioner the benefit of the doubt and presumed prejudice, the court was not necessarily required to since there was no indication, despite the delay, that the prosecutors were intentionally delaying the trial. See Robinson v. Whitley, 2 F.3rd 562, 570 (5th Cir. 1993).

II.

Petitioner next claims that this Court should grant a writ of certiorari to determine whether the appellate court may consider events occurring after the denial of Appellant's motion for speedy trial in determining whether the presumption of prejudice was rebutted (Petition at 13).[2] Petitioner alleges that the opinion of the Missouri Court of Appeals, Eastern District, conflicts with this court's precedent in Doggett v. United States, 505 U.S. 645, 112 S.Ct. 2686 (1992). This question is without merit because the opinion in this case in no way conflicts with Doggett and is, in fact, consistent with precedent established in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182 (1972).

The dissent to the Missouri Court of Appeals opinion, filed by Judge Karohl, suggests that the majority opinion wrongly considered facts occurring after the denial of the speedy trial motion in deciding whether Appellant had been prejudiced. Ivester at 768. Petitioner relied on this dissent in his motion for rehearing before the Missouri Court of Appeals and in his argument before the Missouri Supreme Court. This argument conflicts with established law.

The most important single factor under Barker is how the defendant's ability to put on a defense was impaired by the delay before trial. When reviewing the denial of a motion to dismiss, therefore, appellate courts by necessity

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[2] It is certainly questionable whether, in this case, the Missouri Court of Appeals should have found that a presumption of prejudice existed. Since there was no reason to believe that the government prosecutors intentionally delayed the trial, petitioner should have been required to show "specific prejudice to the defense." Robinson v. Whitley, 2 F.3rd 562, 570 (5th Cir. 1993). The Missouri Court of Appeals opinion gave petitioner the benefit of the doubt in this issue and required the state to rebut the presumption of prejudice.

examine what type of defense was offered at trial to determine if the defendant's ability to defend himself was impaired. For example, if a defendant, prior to trial, files a motion to dismiss because delay has caused him to forget the names of defense witnesses, but at trial the defendant calls multiple witnesses in his defense, the appellate court would surely consider that when determining whether his ability to defend himself had been impaired. Petitioner's argument that the appellate court should not consider events occurring after the denial of his motion defies logic and practice.

Neither Barker v. Wingo nor Doggett v. United States, state that appellate courts are prohibited from considering events occurring after the denial of a motion to dismiss in deciding whether a defendant was prejudiced. In fact, in Barker, the very case which established current speedy trial analysis, the United States Supreme Court referred to the **trial record** when discussing whether the defendant had been prejudiced. Barker 92 S.Ct. at 2194. This court noted, "the trial transcript indicates only two very minor lapses of memory - one on the part of a prosecution witness - which were in no way significant to the outcome." Id.

Appellant's reliance on Doggett is misplaced. Doggett only states that the government could not use the fact that the defendant ultimately plead guilty in that case to defeat his speedy trial claim. That is only a reflection of common sense, however, since in Doggett the guilty plea specifically provided that the defendant reserved the right to appeal the denial of his speedy trial claim. Id. at 2694. By contrast, in the present case, the Missouri Court of Appeals used Appellant's sworn statements at the sentencing hearing which indicated that he was not prejudiced by the pretrial delay.

The analysis of the Missouri Court of Appeals, Eastern District, was consistent with United States Supreme

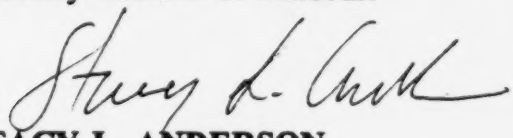
Court precedent in Barker and Doggett. This case presents no question that is worthy of the review of this Court.

CONCLUSION

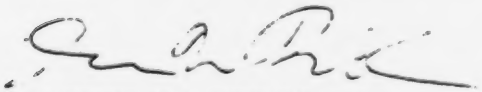
In view of the foregoing, respondent submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri



STACY L. ANDERSON
Assistant Attorney General
Attorney of Record



DANIEL W. FOLLETT
Assistant Attorney General
Of Counsel

Post Office Box 899
Jefferson City, MO 65102
(314) 751-3321
Attorneys for Respondent